IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 664.

THE HEBE COMPANY AND CARNATION MILK PRODUCTS COMPANY, CORPORATIONS, PLAINTIFFS IN ERROR,

vs.

NORMAN E. SHAW, SECRETARY OF AGRICULTURE OF OHIO; THOMAS C. GAULT, CHIEF OF BUREAU OF DAIRY AND FOODS OF THE BOARD OF AGRICULTURE OF OHIO, AND OTHER OFFICERS AND AGENTS CLAIMING TO ACT UNDER THE AUTHORITY OF SAID THE BOARD OF AGRICULTURE OF OHIO, OR OF THE SECRETARY OF AGRICULTURE OF OHIO, DEFENDANTS IN ERROR.

REPLY BRIEF OF APPELLANTS.

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REPLY BRIEF OF APPELLANTS.

Appellees' brief proceeds upon the theory that appellants are food adulterators, reaping large profits by evading the pure food laws. This is absolutely unwarranted and tends to prejudice the court in considering the merits of the controversy. Following out this theory, appellees (Brief, p. 2)

claim the "right to presume" that the Carnation Milk Products Company was too careful of its reputation to market "Hebe" in its own name, and incorporated The Hebe Company to sell the product, while the Carnation Milk Products Company remained in the background, in order "to divert from the Carnation Milk Products Company any criticism or attack leveled at the adulterated product." All this unfair suggestion is entirely gratuitous. There is absolutely no evidence in this case that the Carnation Milk Products Company incorporated, or caused to be incorporated, The Hebe Company, nor is there any evidence from which such an inference can be drawn. In view of this statement of counsel for appellees, we feel that we may state to the court that such was not the fact. The facts are that one Clarence S. Stevens, with other co-inventors, discovered and perfected the process of making "Hebe" (Rec., p. 53), and placed it upon the market in February, 1915 (Rec., p. 55), under the name of "Hebe." The statements that the Carnation Milk Products Company found that large sums of money could be made by adulterating foods (Brief, p. 2); that it is "selling adulterated food in Ohio" (Brief, p. 3); that it is a "food profiteer" (Brief, p. 16), have absolutely no foundation in the record. They are simply charges of illegal conduct and epithets, with no evidence or reason to support them. The insinuations in appellees' brief are so manifestly unjustified that we cannot pass them without notice. The fact that the Carnation Milk Products Company joins as complainant in this bill ought to dispel any suspicion that that company is ashamed of the product "Hebe," or is "too careful of its reputation to market this product under its own name." Throughout appellees' brief "Hebe" is characterized as "an adulteration," a "shrewd imitation" (Brief, p. 41), etc., being "palmed off" on soldiers of the United States, etc. (Brief, p. 28). All these accusations are leveled against a product which has the specific approval of the United States Department of Agriculture (Rec., p. 79).

"Hebe" is not condensed whole milk. It does not purport to be such. No claim that "Hebe" is adulterated can be based upon the proposition that it is condensed whole milk. All admit that it is *not* condensed whole milk.

According to this method of reasoning cocoa would be an adulteration of chocolate, and molasses candy and molasses itself would be an adulteration of sugar.

On pages 14 and 15 of appellees' brief attention is drawn to certain sections of the Ohio Code, which it is claimed make "Hebe" an adulteration. These serve to confuse rather than to enlighten the Court upon the issues in this case.

Section 5778 contains six definitions of what shall be deemed adulteration in the case of food. It is said by appellees that "Hebe" is adulterated under the second definition because a cheaper substance has been substituted for butter fat, and it is adulterated under the third definition because a valuable ingredient has been removed from it, and it is adulterated under the fourth definition because it is an imitation of and sold under the name of another article, to wit, milk, and it is adulterated under the sixth definition because it is made to appear of better value than it is.

The fallacy of the above contentions is, that "Hebe" is not sold as condensed whole milk or as whole milk. Therefore, under the second definition, a cheaper substance has not been substituted for "Hebe"; under the third definition a valuable ingredient has not been removed from "Hebe"; under the fourth definition the product is not an imitation of or sold under the name of milk, because it is sold as "Hebe" and not as milk; and under the sixth definition the product is not made to appear better than "Hebe." In other words, in order to apply these definitions of adulteration it is necessary to have as a premise a certain product which is labeled and sold as and for such product, and then to determine what has been added to this product or subtracted therefrom, down through the list of definitions of adultera-

tion. If this were not so it would be impossible to sell any manufactured product, because every manufactured product is subjected to some degree of addition or subtraction in the process of manufacture. This question is disposed of, so far as the State of Ohio is concerned, by the decision of the Court in—

Rose vs. State, 11 Ohio Cir. Ct. Rep., 87,

referred to on page 33 of our original brief. In that case the identical definitions of adulteration referred to above were construed by the Court.

Section 12717 of the Ohio Code, referred to on page 15 of appellees' brief, prohibits the sale of milk to which water or any foreign substance has been added. This section plainly has nothing to do with the issues involved in the present case. It deals with watered whole milk. If this section were construed to apply to every article into which milk entered in any form, it would prohibit the sale of ice cream, milk chocolates, malted milk, all sorts of mixed milk drinks, etc. Such a construction of the section would be absurd, and a similar statute in Massachusetts has been held to apply to whole milk and not to condensed milk.

Commonwealth vs. Boston White Cross Milk Co., 202 Mass., 30.

Appellees, on page 28 of their brief, seek to make much of the supposed fraud in the sale of "Hebe" by the Monypeny-Hammond Co., of Columbus, Ohio, to Camp Willis to be supplied to soldiers in that camp. The evidence pertaining to the Camp Willis sale was given by Quartermaster Arthur W. Reynolds (Rec., pp. 79, 80, 81), and in substance is to the effect that during August, 1916, the Quartermaster's Department of Camp Willis was in the habit of sending out to the trade about every five days proposals or specifications for evaporated milk needed to supply the soldiers in the camp; that these specifications were sent to the

Monypeny-Hammond Company as well as to other companies; that the Monypeny-Hammond Company furnished two or three brands of milk to the camp; that they furnished some "Hebe," but the witness did not know how much; that the first lot of "Hebe" so furnished was placed in the storeroom and issued, but that before the second shipment was issued, there was a protest against it, and it was returned. On cross-examination, witness testified that he could not say whether he had looked at the labels or not. This is all that appears in the record concerning the Camp Willis incident. It seems incredible that the Quartermaster's Department of Camp Willis could have been misled or defrauded, because the Hebe which was delivered to the camp was plainly labeled to show just what it was. The evidence does not show whence the protest came,—whether from the soldiers, the public, competitors of appellant, or the Ohio State Dairymen's Association, whose president testified on the hearing that he "wants to keep this product (Hebe) out of the State of Ohio" (Rec., p. 127). It is upon this most fragile foundation that appellees base their charge of fraud against the Monypeny-Hammond Company "contracting to deliver standard condensed milk, contracting to receive pay for it, and unable to resist the temptation to make the increased profit, sending in a commodity which cost it less money than standard condensed milk, palming off on soldiers of the United States an adulterated article when they were paid for furnishing a standard article" (Brief, p. 28).

Of course, the complainants are not shown to have had any knowledge of this transaction, and it is not claimed that they had such knowledge.

The second instance cited by appellees of deception in sales of Hebe is in the case of a sale of Edwin James, as inspector of the Department of Agriculture of Ohio. This matter is developed upon page 28 of appellees' brief, and is based upon the testimony of a State inspector, to the effect that on May 11, 1917, he went into Schreiber's grocery

store in Ironton, Ohio, and asked the "lady clerk" if they had any condensed milk; that she stated that they had the "Hebe" brand and *witness* then said *"That will do.* Give me two cans." Aside from the fact that this testimony is furnished by a State inspector, it should be noted that he hastily took "Hebe," saying, "That will do," without asking what "Hebe" was, or making any further inquiry. His object was to procure evidence. And when the clerk gave him the two cans, each can told him plainly what "Hebe" was. The same inspector also furnishes testimony as to the sale to him of "Hebe" in East Ironton, Ohio, his testimony on this point being commented on in appellants' original brief (p. 29). It will be noted that the storekeeper said "I have "Hebe" also, * * * for you see it" (Rec., p. 81). There was no possible deception, as the "Hebe" label spoke for itself.

The only other instance of alleged deception in the sale of "Hebe" is referred to upon pages 28 and 29 of appellees' brief, and consists of an advertisement of "Hebe Milk" in the "Columbus Citizen" dated Friday, April 21, 1916, by the Fulton Market, a retail grocery store, of Columbus, Ohio. The total advertisement is about four inches wide and six inches long, and the part referring to "Hebe Milk" consists of only three lines in the corner, in small type, and reading as follows: "Hebe Milk. Large regular 10-cent cans. Saturday, 2 cans, 15 cents."

These isolated instances are the only evidence which appellees produced to substantiate their much-reiterated arguments that deception is widely practiced in the sale of "Hebe" in Ohio. They have strained these small incidents in an effort to make a mountain out of a mole hill. In none of these cases was it shown, nor is it even claimed that the complainants had any knowledge whatever of the transactions.

It is worthy of note that not a single consumer in the

State of Ohio is produced as a witness or is shown to have made any complaint of deception.

Appellees contend that it cannot be urged upon any sensible mind that "Hebe" is a compound; that the relative proportions of the condensed skimmed milk and the cocoanut oil are not such as to create a compound; that if "Hebe" is held to be a compound it will open the door for food profiteers to evade the law by the addition of an infinitesimal amount of a foreign article to an adulterated product and to claim that the result is a compound.

We had occasion to comment upon this point in our original brief (Brief, p. 23). "Hebe" is not a subterfuge, and appellees are forced to this contention by the necessities of their case. The fact is, that "Hebe" is the result of a scientific development. It is an invention of a new product and marks an advance in food science.

Whole milk differs from skimmed milk. The difference consists in the removal of a very small percentage of the whole milk, consisting of butter fat. If we consider only the amount of butter fat removed, we might say that there had been no substantial change effected. But when we consider the effect upon the product resulting from the abstraction of the butter fat, it is plain that a substantial change has been brought about. Every one recognizes the difference between skimmed milk and whole milk. To reverse the operation, by combining and emulsifying skimmed milk with even a small amount of vegetable fat (but that amount being practically equal to the butter fat removed), a decided change is effected in the product. In the latter case, there is the same difference between the skimmed milk and the emulsified product as there is in the former case between the whole milk and the skimmed milk.

The small amount of vegetable fat found in "Hebe" is not the result of an attempt to evade the law. It is as large an amount as the butter fat in whole milk, "which rarely has six per cent of butter fat, and as a rule it shows less than

four per cent" (Rec., p. 62). It is the amount necessary "to produce a properly and correctly balanced food" (Rec., p. 69). The good faith of appellants in manufacturing and selling "Hebe" seems to us too evident to require argument. "Hebe" is not a subterfuge. It is not adulterated milk with a small percentage of some unimportant article added (Appellees' Brief, p. 17). It is a pure, wholesome, and nutritious food compound, labeled and sold honestly and fairly.

Appellees (Brief, p. 29) seek to make much of the fear that "Hebe" will be used as a baby food, especially by the poor, and say that if "Hebe" were fed continuously to an infant its growth would cease, and if the feeding were long persisted in the child would die. This is another gratuitous statement of counsel, with absolutely no evidence in the record to support it. The inference sought to be drawn is that condensed whole milk is especially adapted as a food for infants, while "Hebe" is not. The only evidence in the record on this point is that "no condensed milk or evaporated milk is an ideal baby food, although it may be used in some circumstances, but would not be used as a matter of choice" (Dr. Wilson, Rec., p. 62), and further that "as between whole condensed milk and 'Hebe' for infant food the one is as valuable for nutritive purposes as the other" (Rec., p. 62); and 'Hebe' is as fit for infant food as condensed whole milk or evaporated whole milk" (Dr. Wesener, Rec., p. 72). Appellees contend that the purely suppositious superiority of condensed whole milk to "Hebe" as a food for infants justifies the State of Ohio in absolutely prohibiting the sale of "Hebe." In another part of their brief (p. 40) it is said that the people of Ohio have abundant opportunities to get all the skimmed milk which they desire. This argument is apparently used to show that the public will not suffer if condensed skimmed milk is driven from the market. Why is it that appellees are so indifferent to the sale of uncondensed skimmed milk in Ohio, and so fearful that the people may use the *condensed* skimmed milk in "Hebe"? It is

said that the condensed skimmed milk in combination in the product "Hebe" might be fed to babies, and that this would stunt their growth and they would die. But there is no law in Ohio to prevent the feeding of uncondensed skimmed milk to babies, and if the sale of condensed skimmed milk is forbidden, so that the Ohio babies cannot be fed with it, then the logic of the situation demands that the sale of uncondensed skimmed milk in Ohio, now expressly permitted, be prohibited, so that the babies may be protected.

Appellees say (Brief, p. 14) that fraud is more easily carried out in connection with condensed milk than with uncondensed milk, because the condensed milk is sealed securely in cans and the consumer buys it at the grocery store and takes it home, and it may be days or weeks before he uses it, and then he finds out for the first time what is in the can. If he finds out what it is when he uses it, there is no excuse for his feeding it to his babies, and if he takes the can home and keeps it for weeks, and during all that time a plain label is on the can telling him that the product is not whole condensed milk, but is in fact "Hebe," a compound of condensed skimmed milk and cocoanut oil, then the fact that he has the can in the house for several weeks and each time he uses it he is confronted with the label, seems to us to amply guard him against fraud and apprise him of the character of the food which he is about to use. Again, there is no statement on the label of "Hebe" that it is a food for infants, nor is there anything thereon from which any such inference can be drawn.

Furthermore, under the Ohio statutes, skimmed milk may be lawfully sold if the can or vessel from which or in which such skimmed milk is sold is labeled with the words "skimmed milk" in letters not less than 1 inch in length (section 12720, Ohio Code, Rec., p. 6). The dishonest milkman may drive his milk wagon to a home and draw off a

pint of skimmed milk from a can standing in his wagon, such can being labeled as prescribed by the statute, and deliver that pint of milk to a poor family as and for whole milk. He can make his product attractive by selling it a little cheaper than whole milk. The mother takes this milk and feeds it to her babies. There is no argument upon the proposition that this skimmed milk would not be as good for the babies as "Hebe" is, because the skimmed milk would be entirely devoid of fat. In the meantime, the parents would have no opportunity to find out what kind of milk they were buying. They would have no can before them in their home, as they have in the case of "Hebe," stating plainly of what the product consisted. They would be obliged to depend almost entirely upon the honesty of the milkman.

Yet, with all these possibilities of danger in the sale of skimmed milk, appellees seek to impress upon the Court the fact that if "Hebe" is prohibited in Ohio the people can still get skimmed milk in an uncondensed form. Appellees seem to have no apprehension that the poor of the State may prefer to buy the skimmed milk or be obliged to buy it because of the cheaper price, and that there is danger that this skimmed milk may be fed to the babies of the poor. The whole argument concerning the baby food feature of the case is without merit and is brought forward in an attempt to prejudice the real issues in the controversy.

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